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Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

JACK R. & PATRICIA J. FINNEGAN,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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46 pp

QUESTIONS PRESENTED

1. Is it the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not ignore the issue presented to it, or create a new cause?

2. Did the Ninth Circuit error when it failed to address the real issue before it?

3. Did the Tax Court exceed its jurisdiction and deny petitioners' due process under the Fifth Amendment?

4. The Judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who reviewed this case, to say that the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

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The petitioners Jack R. & Patricia J. Finnegan respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for rehearing with suggestion for rehearing en banc for the Ninth Circuit was not published and is reproduced below in the Appendix to this Petition as Appendix ("App.") A, at 1a. The memorandum of the United States Court of Appeals for the Ninth Circuit was not published and is reproduced below as Appendix ("App."). B, at 2a. The order of the United States Court of Appeals for the Ninth Circuit was not published and is reproduced below in the Appendix to this Petition as Appendix ("App.") C, at 5a. The acknowledgement of Hearing Notice of the United States Court of Appeals for the Ninth Circuit is reproduced below as Appendix ("App."). D, at 6a. The order of the United States Court of Appeals for the Ninth Circuit was not published and is reproduced below in the Appendix to this Petition as Appendix ("App.") E, at 7a. The order of the United States Tax Court is reproduced below in the Appendix to this Petition as Appendix ("App.") F, at 8a. The order and decision of the United States Tax Court is reproduced below in the Appendix to this Petition as Appendix ("App.") G, at 10a. The T. C. Memo 1997-486 of the United States Tax Court is reproduced below in the Appendix to this Petition as Appendix ("App.") H, at 11a. Excerpted Pages from the Official Trial Transcript of the United States Tax Court is reproduced below in the Appendix to this Petition as Appendix ("App.") I, at 20a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit ("Court of Appeals") was entered on May 12, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C.S. § 1254(l) (1988).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE V, provides in pertinent part:

No person shall be...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CALIFORNIA CONSTITUTION

ARTICLE I, Section 7(a)

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution...

STATUTES

Because the statutory provisions involved in this matter are lengthy, only the immediately pertinent portions of statutes have been set out in this Petition. These statutory provisions include:

Rules of Civil Procedures Rule 56c

Internal Revenue Code Section 6213

STATEMENT OF THE CASE

HISTORY OF THE LITIGATION

The Ninth Circuit found its solution to the problem, by invoking a competing problem. This is contrary to the long established doctrine that a litigant is entitled to only one day, in court, that the decision at the end of his day is final as to him except as he takes an appeal, that he is bound by the court decision, and that he cannot come back for another day merely because some new argument has occurred to him. The respondents, had had their day in court.

When the essential criterion of appellate jurisdiction, is to revise and correct proceedings in a cause already instituted, and particularly in cases warranted by the principles and usage of law, it cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words would require it.

The administration of justice by the courts is not necessarily always wise or certainly considerate as illustrated by this case.

There was only one issue before the Ninth Circuit. There was only one issue before the Tax Court. In both forums it was the same issue.

The only issue in this case was a deficiency claimed by the Commissioner of Internal Revenue (Hereinafter Respondent). The respondent conceded there was not a deficiency and that no tax was owed (See App. I, pages 24a and 25a). Once the Tax Court ruled there wasn't a deficiency and that no tax was owed, all other issues allowing the respondent a 2nd, 3rd and 4th case opportunity were mooted. No other issues were raised in the Deficiency Notice or the Answer. The Tax Court denied the respondent any amendment to their pleadings. If no deficiency and no tax was owed the petitioners overpaid their legal tax.

The judgment by the Tax Court was rendered forthwith and the Tax Court ruled that there was no genuine issue as to any material fact and that the moving party was entitled to a summary judgment as a matter of law.

The Tax Court's judgment was rendered upon the whole case because the Tax Court determined that there was no deficiency, under the authority of §6213, no tax was due and ascertained that no material facts in good faith actually existed. (See Appendix I, pages 24a and 25a).

The only issue under the authority of §6213 was a re-determination by the Tax Court of the deficiency claimed by the respondent. Once the respondent conceded there was no deficiency there was an absence of factual dispute on the only issue. This was the device designed to effect a prompt disposition of controversies on their merits without resorting to a lengthy trial, if in essence there is no real dispute as to salient facts or if only a question of law is involved

Genuine issues which will preclude entry of summary judgment are issues which can be sustained by substantial evidence. Once the respondent conceded there was no deficiency and no tax due the case was in compliance with Civil Rules of Procedure Rule 56c. *Riss & Co. v. Association of Am. Railroads*, D.C.D.C., 190 F.Supp. 10, 17. As used in rule that burden of proving absence of material fact so that no "genuine issue" is left determination is on movant for summary judgment, means a real as opposed to a false or colorable issue. *Byrd v. Leach, Fla.App.*, 226 So.2d 866, 868. A "genuine issue of fact" precluding summary judgment exists whenever there is slightest doubt as to facts. *Seliga Shoe Stores, Inc. v. City of Maplewood, Mo.App.*, 558 S.W.2d 328, 33 1. See Fed. R.Civil P. 56(c). There can be no doubt if the respondent conceded that there was no deficiency and no tax due.

A taxpayer who is asked to pay too much, or pay a tax forbidden by the constitution, clearly has standing to contest such exaction. Petitioners were asked to pay a tax forbidden by the constitution when the question sought to be adjudicated has been mooted by summary judgment, and when there is no standing to maintain further action. Such further action is a deprivation of property without due process of law as clearly stated by the Fifth Amendment and Article I, Section 1, of the California Constitution. The case thereafter became incontestably moot.

The past cannot always be erased by a new judicial declaration.

BASIS FOR FEDERAL JURISDICTION IN THE FIRST INSTANCE

The Tax Court had jurisdiction arising under the laws of the United States pursuant to Section 6213 of the Internal Revenue Code.

REASONS FOR GRANTING THE WRIT

I. The petition should be granted because a litigant should be entitled to only one day in court, except as he takes appeal and the decision at the end of the day should be final.

II. The petition should be granted because this case presents the important issue of equal justice under the law being denied and because a most basic right, the right to obtain justice arising from certain remedy in the laws.

SUMMARY OF ARGUMENT

Argument I, addresses the Constitutional issue of judicial error in not applying established law to the outcome of a case and also addresses the Constitutional issue of due process and equal protection of the laws under the Fifth Amendment and the California State Constitution.

Argument II addresses the wrongful application of Rule 56c of the Federal Rules of Civil Procedure and Section 6213 of the Internal Revenue Code..

ARGUMENT I

The respondent had full opportunity to present any issues to the proceeding not only as to its regularity, or the fairness but also as to the validity of the statute under which the proceeding was brought to the Tax Court. No question of validity was raised. The respondents, having the opportunity to raise the question of invalidity, were not the less bound by the ruling because they failed to raise it.

The remaining question is simply whether respondents having failed to raise the question in the deficiency notice or in their answer in which they could have raised it and had it finally determined at trial that they could not amend their answer were privileged by the Tax Court to raise new issues. Such a view is contrary to the well settled principles of law.

The new issues raised by the respondent after summary judgment were not relevant to the authority of the Tax Court nor does petitioner believe that this Tax Court has the right to undertake the re-writing of the law as it applies to summary judgement. The Tax Court denied respondent the right to amend their pleadings related to the deficiency claimed by respondent and in furtherance of a legitimate authority of the Tax Court the Tax Court's continuance to allow new issues and respondent numerous "Second Chances" to alter their case conducted solely for the personal aggrandizement of the Tax Court or to "punish" petitioner are indefensible. The First Amendment may be invoked against infringement of the protected freedoms by law.

The questions asked the petitioner were not only amorphous on their face, but in some instances clearly foreign to the alleged subject matter of the petition for redetermination.

ARGUMENT II

Rule 56 of the Federal Rules of Civil Procedure, is clear, precise, and logically unassailable. If the ruling by the Ninth Circuit in this case is left standing it would undermine the ability to interpret and apply federal law throughout the Ninth Circuit.

What was required was simply interpreting the law. This was not a consistent, reliable application of the law to the facts of this case. The instant the summary judgment was granted as to the deficiency claimed by the respondent, the Tax Court made a re-determination of the deficiency and all other issues in this Tax Court case were mooted under the authority of §6213. This departure from Rule 56, would subvert the very foundation of all written law. The motion for summary judgment was properly before the Tax Court. The Tax Court ruled that there was no deficiency. (See App. I, pages 23a and 24a).

The 1937 adoption made this rule applicable to all actions, including those against the United States or an officer or agency thereof. The 1937 adoption also made clear that the summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact.

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Tax Court, which permitted the pleadings themselves to stand in the way is incompatible with the basic purpose of utilization of the salutary, device of summary judgment. See *6 Moore's* Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, Federal Practice and Procedures, § 1235.1.

In determining what constitutes a genuine issue as to any material fact for purposes of summary judgment, an issue is "material" if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. *Austin v. Wilder*, 26 N.C.App. 229, 215 S.E.2d 794, 796. See Fed.R.Civil P. 56(c).

A material fact is one which is essential to the case, and without which it could not be supported. One which tends to establish any of issues raised. The "material facts" of an issue of fact are such as are necessary to determine the issue. Material fact is one upon which outcome of litigation depends. *Amant v. Pacific Power & Light Co.*, 10 Wash.App. 785, 520 P.2d 481, 484.

A material fact is one that a reasonable man would attach importance to in determining the outcome of a case.

The Rule clearly states that respondent must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, shall be entered against the adverse party.

This Court in *Nebraska v. Wyoming- U.S.* - 773 S.Ct. 7689, 723 L.Ed.2d377 (1993) stated when the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case; in determining whether a material factual dispute exists, the court views the evidence through the prism of the controlling legal standard. To rule otherwise is too extravagant to be maintained.

The Supreme Court has made it clear, that if an order be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement.

Once the summary judgement for petitioners was granted the case became incontestably moot as to all other issues and the Tax Court was not functioning as a competent tribunal under authority granted in Section 6213, to determine a deficiency asserted by the respondent. The issues raised after the granting of summary judgement did not relate to the matter which the Tax Court was empowered to investigate. The Rule comes to us with a "persuasive gloss of legislative and judicial history," which shows beyond doubt that summary judgement by the court is to be relied upon by trial participants.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly, applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they, swear to support!

The oath of office, too, imposed by the legislature, is completely, demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States".

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

The Tax Court is controlled by law, and it has its mandated appropriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten code to which resort can be had as a source of jurisdiction. The Tax Court without fixed or certain rule has no place in law under the Constitution. This Tax Court jurist should have been acting in fulfillment of his solemn oath of office, to enforce the laws. Instead of acting in contrast to this his duty to "take care that the laws be faithfully executed" seems a vital requirement that he carry out the laws of Congress.

Duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of enforcing its laws in the conscientious and faithful discharge of the courts duties.

The Court's power, to issue orders must stem either from an act of Congress or from the Constitution itself. There is no

statute that expressly authorizes the Court to take possession of property as the Court did here. Nor is there any act of Congress to which such a power can fairly be implied.

An excessively broad charter, taken by this Tax Court in this case, places the courts in an untenable position if they are to strike a balance for the right of citizens to carry on their affairs free from unnecessary governmental interference. In fulfillment of their obligation under this statute, the courts must accord to the petitioners every right, which is guaranteed.

An erroneous determination by this Tax Court, even if made in the utmost good faith, does not exculpate the court should later this Supreme Court rule that conceding no deficiency was paramount to the issue under inquiry. To hold otherwise would infringe upon petitioner's rights protected by the Fifth Amendment.

These precedents inform us of the extent of the struggle to preserve liberty, and to relieve those in civil life from FALSE trials. The founders of our government were familiar with the history of that struggle, and secured in a written Constitution every right, which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. The provisions of the administration of summary judgement justice are too plain and direct to leave room for misconstruction or doubt of their true meaning.

By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty

would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended. Such a doctrine leads directly to anarchy or despotism.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Such law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the Tax Court independent of, and superior to, the civil power. The Tax Court attempts to do here, that which the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

If this is allowed to continued it is a gross usurpation of power. Such rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.

This order also deprives petitioners of all their constitutional rights to procedural due process. Which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation.

The order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.

But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. But once a judicial opinion

rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated this principle

In the framework of our Constitution the Court's power to see that the laws are faithfully executed refutes the idea that the Court is to be a lawmaker. The Constitution limits this function in the lawmaking process, and the Constitution is neither silent nor equivocal about who shall make laws which the Court is to execute.

The Founders of this Nation entrusted the lawmaking power to the Congress alone. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice that the Laws be faithfully executed. Such a review would but confirm that this Court Order cannot stand.

The duty of the courts to see that the laws be executed is a duty that does not go beyond the laws or require the courts to achieve more than Congress sees fit to leave within their powers. The powers of the courts are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives essential content to undefined provisions in the frame of our government. A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afforded.

As Mr. justice Brandeis stated: "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

That is a risk inherent in our system of separation of powers. The tragedy of such stalemates might be avoided by allowing the courts the use of some legislative authority. The Framers with memories of the tyrannies produced by a blending of judicial, executive and legislative power rejected that political arrangement. We pay a price for our system of checks and balances, for the distribution of power among the three branches of government. It is a price that today may seem exorbitant to many.

But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that conduct so largely uncontrolled, upon nebulous, inherent powers never expressly granted but said to have accrued to the courts from the customs and claims of power to deal with a crisis according to the necessities of the case, the unarticulated assumption being that necessity knows no law.

Under this procedure we retain Government by law. The public may know the extent and limitations of the powers that can be asserted, and persons affected may be informed from the statute of their rights and duties. Such power either has no beginning or it has no end. If such power does exist it need submit to no legal restraint. It is certain to plunge us straightway into anarchy, and if allowed to stand is a step in that wrong direction. The essence of our free Government is "leave to live by no man's leave, underneath the law" to be governed by those impersonal forces which we call law. Our Government is fashioned to fulfill this concept so far as humanly possible.

It is the duty of the Court to be last, not first, to give them up.

The chief aim of this Tax Court was to try petitioners and punish them because they have challenged the respondent's deficiency, which constitutes a bill of attainder. This is not a purpose to which petitioner's rights under the Fifth Amendment can validly be subordinated.

No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when appearing in a courtroom whether the court be a Title I or Title III court to receive adjudication according to law and to receive the protections of the written constitution.

The Judicial power of the United States is extended to all cases arising under the Constitution. Could it be the intention of those who reviewed this case, to say that the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises? Here the language of the constitution is addressed especially to the courts. It prescribes, directly, for them, a rule of evidence not to be departed from. The departure from the rule of evidence by the Tax Court has impaired the utility of the summary judgment device.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act by a Title I Tax Court, repugnant to the Constitution, is void. This theory is essential to a written Constitution, and, is consequently, to be considered, by this court, as one of the fundamental principles of our society.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that Rule 56c of Federal Rules Civil Procedure is such a law.

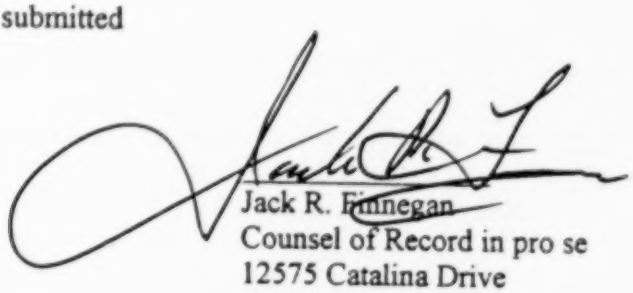
This Court must rely on deductive reasoning. Summary judgment was appropriate in this case. If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that is the duty of this Court to be last, not first, to give up on such settled law. The Tax Court ruling should be void for vagueness under the process clause. This question is too clear to need further argument to prove it.

The Supreme Court's function, at this point, is purely one of constitutional adjudication in this particular case and upon this particular record before the Supreme Court. Petitioner ask this Court to blind itself to national Tax Court policies which have determined the whole course of our national tax policy by violating constitutional rights of parties seeking justice in redetermination and to focus on the vast burdens which these conditions have entailed for the entire Nation.

CONCLUSION

This case presents serious due process issues concerning a statute invoked in hundreds of thousands of cases annually. This case presents the opportunity for this Court to give much needed guidance to lower courts to remedy unequal protection under the law. Petitioners respectfully requests this court grant Certiorari to review the facts and issue.

Respectfully submitted



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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MAY 12, 1999.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 98-70207 and Tax Court No. 6944-95

JACK R. FINNEGAN; PATRICIA J. FINNEGAN

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent - Appellee.

ORDER

Before: PREGERSON, BEEZER, and HAWKINS, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing. Judges Pregerson and Hawkins vote to reject the petition for rehearing en banc and Judge Beezer so recommends.

The full court has been advised of the petition for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc. *See* Fed. R. App. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

A true copy:
Teste:

Clerk of the United States Court
of Appeals for the Ninth Circuit

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED FEBRUARY 11, 1999.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 98-70207 and Tax Court No. 6944-95

JACK R. FINNEGAN; PATRICIA J. FINNEGAN
Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent - Appellee.

MEMORANDUM*

Appeal from the United States Tax Court

Submitted February 5, 1999**
Pasadena, California

Before: PREGERSON, BEEZER, and HAWKINS, Circuit Judges.

Jack R. and Patricia J. Finnegan appeal pro se the tax court's decision upholding the Commissioner of Internal Revenue's ("Commissioner") determinations that the Finnegans' are not entitled to deduct expenses arising from the construction and

*/ This disposition is not appropriate for publication and may not be cited to or used by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**/ The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

attempted sale of a residence under 26 U.S.C. § 162, and that there is a deficiency in income tax in the amount of $10,081. The tax court properly exercised jurisdiction pursuant to 26 U.S.C. § 7442. We have jurisdiction pursuant to 28 U.S.C. § 7442 and we affirm.

We review decisions of the United States Tax Court on the same basis as decisions in civil bench trials in the United States District Court. See Estate of Rapp v. Commissioner, 140 F.3d 1211, 1214 (9th Cir. 1998). We review the tax court's conclusions of law de novo. See id. at 1215. We review for clear error the tax court's factual findings. See id.

The tax court correctly concluded that the Finnegans' were not entitled to deduct the costs associated with the construction and sale of the residence as trade or business expenses. In order to deduct expenses incurred in carrying on a trade or business under 26 U.S.C. § 162, a taxpayer must show that the activity was engaged in with the intent of realizing a profit. See Independent Elec. Supply v. Commissioner, 781 F.2d 724, 726 (9th Cir. 1986). Although the focus of this inquiry is the subjective intent of the taxpayer, "objective indicia may be cited to establish the taxpayer's true intent." Id.

The tax court determined that Jack Finnegan had little prior experience in selling projects he had constructed and that he made few attempts to sell the residence. The taxpayers still owned the house five years after its completion. On this basis, the tax court did not err in determining that the taxpayers were not entitled to deduct the expenses under § 162.

The Finnegans also challenge the tax court's exclusion of testimony supporting their profit motive. We review the exclusion of testimony for an abuse of discretion. See Sementilli v. Trinidad Corp., 155 F.3d 1130, 1133 (9th Cir. 1998). Our review of the transcript of the hearing leads us to conclude that the court did not abuse its discretion regarding Finnegan's testimony.

We conclude that the Finnegans' remaining contentions lack merit and adopt the reasoning of the tax court. The Finnegans' request for award of costs is denied.

AFFIRMED.

A true copy:
Teste:

Clerk of the United States Court
of Appeals for the Ninth Circuit

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 27, 1999.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 98-70207 and Tax Court No. 6944-95

JACK R. FINNEGAN; PATRICIA J. FINNEGAN

Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent - Appellee.

ORDER

The Court is of the unanimous opinion that the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.

Therefore, this matter is ordered submitted on the briefs and record without oral argument on Friday, February 5,1999, in Pasadena, California. Fed. R. App. P. 34(a)(2).

A true copy:
Teste:

Clerk of the United States Court
of Appeals for the Ninth Circuit

APPENDIX D — ACKNOWLEDGEMENT OF HEARING NOTICE OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 11, 1999.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OFFICE OF THE CLERK
125 So. Grand Avenue
Pasadena, CA 91105
626-583-7000

ACKNOWLEDGEMENT OF HEARING NOTICE

ATTN: CALENDAR CLERK DATE: 1/7/99

Case No. **98-70207**

Title: JACK R. & PATRICIA J. FINNEGAN, Appellant/Petitioner
vs.
COMMISSIONER INTERNAL REVENUE, Appellee/Respondent

Assigned for hearing:

Date: **February 5, 1999** Time: **9:00 A.M.**

Location: 125 So. Grand Ave., Pasadena, CA 91105 Courtroom: 2

Counsel to argue: NAME: Jack R. Finnegan, "In Pro Per"
ADDRESS 12575 Catalina Drive
Santa Ana, CA 92705
PHONE: 714-544-3247

Party Represented: Jack R. & Patricia J. Finnegan,
Appellant/Petitioner

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JUNE 2, 1998.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 98-70207 and Tax Court No. 6944-95

JACK R. FINNEGAN; PATRICIA J. FINNEGAN
Petitioners - Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent - Appellee.

ORDER

Appellee's motion for an extension of time to file the answering brief is granted. The answering brief is due June 24, 1998. The optional reply brief is due 14 days from service of the answering brief.

A true copy:
Teste:

Clerk of the United States Court
of Appeals for the Ninth Circuit

APPENDIX F — ORDER OF THE UNITED STATES TAX COURT, DATED DECEMBER 18, 1997.

UNITED STATES TAX COURT

Docket No. 6944-95

JACK R. FINNEGAN; PATRICIA J. FINNEGAN
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

ORDER

On October 28, 1997, the Court filed its Memorandum Findings of Fact and Opinion in this case, Finnegan v. Commissioner, T.C. Memo. 1997-486, which concluded that petitioners were not entitled to deduct various costs incurred in connection with their construction and attempted sale of a house under I.R.C. section 162 for 1991.

On December 1, 1997, petitioner Jack Finnegan filed a motion to revise decision under Tax Court Rule 162. On December 15, 1997, respondent filed a reply to petitioner's motion to revise decision.

In rendering our Memorandum Findings of Fact and opinion, we considered all of petitioners' arguments, the testimony of the witnesses, and the evidence presented. Petitioners have not shown that we made errors of law or fact, offered newly discovered evidence, or shown that there were unusual circumstances which

warrant relief. Accordingly, it is

ORDERED that petitioner Jack Finnegan's motion to revise decision is denied.

A true copy:
Teste:

Stamped Signed by
"S/ _____
Juan P. Vasquez
Judge

Dated: Washington, D.C.
December 18, 1997

APPENDIX G — ORDER OF THE UNITED STATES TAX COURT, DATED OCTOBER 28, 1997.

UNITED STATES TAX COURT

Docket No. 6944-95

JACK R. FINNEGAN; PATRICIA J. FINNEGAN
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

ORDER AND DECISION

On May 2, 1996, petitioners filed a motion for summary judgment. Pursuant to the determination of the Court, as set forth in its Opinion filed October 28, 1997, it is

ORDERED that petitioners, motion for summary judgment is denied as to the overpayment issue. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from petitioners in the amount of $10,801 for the taxable year 1991.

A true copy:
Teste:

Stamped Signed by
"S/ _____
Juan P. Vasquez
Judge

Entered: October 28, 1997

APPENDIX H — ORDER OF THE UNITED STATES TAX COURT, DATED DECEMBER 18, 1997.

T.C. Memo 1997 - 486

UNITED STATES TAX COURT

JACK R. FINNEGAN; PATRICIA J. FINNEGAN
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

Docket No. 6944-95 Filed October 28, 1997.

Jack R. Finnegan, pro se.

Louis B. Jack, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

VASQUEZ, Judge: Respondent determined a $10,801 deficiency in petitioners' 1991 Federal income tax. The issue for decision is whether petitioners are entitled to deduct various costs incurred in connection with their construction and attempted sale of a house under section 162.*

*/ All section references are to the Internal Revenue Code in effect for the year in issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

FINDINGS OF FACT

Oral stipulations were made at trial. The oral stipulation of facts and the referenced exhibits are incorporated herein by this reference. Petitioners, husband and wife, resided in Santa Ana, California, at the time they filed their petition.

During 1991, petitioner Jack R. Finnegan (Mr. Finnegan) was a construction consultant. Mr. Finnegan ran his construction consulting business out of his home in Santa Ana. As a construction consultant, Mr. Finnegan was hired by third parties: (1) To construct and estimate the cost of projects such as houses, banks, restaurants, schools, and hospitals; (2) to help put bids together; and (3) to act as an arbitrator, architect, quantity surveyor, developer, project manager, or general contractor. As a construction consultant, Mr. Finnegan was paid a fixed amount for each project. He was compensated regardless of whether the project was sold.

During 1991, in addition to his job as a construction consultant, Mr. Finnegan constructed a house located at 871 Avenida Acapulco in San Clemente, California (the Acapulco house).** Mr. Finnegan was not compensated for his work on, nor hired by a third party to build, the Acapulco house. Mr. Finnegan had a construction trailer, which he used as an office, parked at the Acapulco house. Mr. Finnegan maintained a telephone line, water, electric, and other utilities at the Acapulco house.

Mr. Finnegan performed substantial amounts of work to construct the Acapulco house including, but not limited to: Laying and staking the building; making the exterior door frames, window frames, and arched brick work; manufacturing the round top, stained glass, and leaded glass windows; manufacturing and finishing the cathedral, coffered, inverted pyramidal, and beamed ceilings; and designing and installing a complete irrigation and drainage system.

**/ During the last 20 years, Mr. Finnegan constructed only one other house for sale, which was sold in 1978 or 1979, where he was not acting as a construction consultant.

Petitioners tried, but were unable, to sell the Acapulco house. Mr. Finnegan was not a licensed real estate broker, and petitioners never listed the Acapulco house with a real estate broker or sales agent. Instead, petitioners put a "for sale" sign in front of the house and ran a classified advertisement, starting in April 1991, in the Orange County Register. As of the time of trial, the Acapulco house had not been sold.

On August 16, 1992, petitioners timely filed their Federal income tax return for 1991 (the original return). On Schedule C of the original return, Mr. Finnegan listed his principal business or profession as "Construction Consultant". In addition to other income, petitioners reported $16,793.89 in gross receipts from the construction consulting business which consisted of payments from (1) Columbo Construction Co. for work on two elementary schools in Ridgecrest, California, and (2) HilGan Development Corp. for repairing an apartment building in Tustin, California, completing a security gates contract, and managing the apartment building in Tustin, California. The original return showed a tax liability of $46,842.82. Petitioners paid this amount.

On January 3, 1994, petitioners filed an amended return for 1991 (the amended return) which showed a revised tax liability of $27,371.12 and sought a refund of $19,471.70. On Schedule C of the amended return, which listed Mr. Finnegan's principal business or profession as "Construction Consultant", petitioners claimed an additional $59,186.95 of expenses (the additional expenses)*.

*These additional expenses are the result of petitioners, claiming new items or increasing the amount for items claimed on the original return. Respondent concedes that petitioners substantiated the following amounts:

Item	Amount
Advertising	$1,719.83
Commissions and Fees	125.00
Repairs and Maintenance	85.00
Supplies	4,405.99
Utilities	921.08
Mortgage Interest	49,860.47
Total	57.117.37

Petitioners concede any difference between the new or increased amounts and the amounts respondent concedes.

Petitioners incurred all of the additional expenses in connection with their construction and attempted sale of the Acapulco house (the real estate activity)*.

In April 1994, the Internal Revenue Service (IRS) assigned petitioners, refund claim to Office Auditor Monte Kruse (Mr. Kruse). On or about May 20, 1994, Mr. Kruse proposed a partial disallowance of the refund claim. On or about June 23, 1994, Mr. Kruse sent petitioners a Letter 905 (Formal Notice of Partial Claim Disallowance) which allowed $10,801 of the refund claim. Petitioners protested the proposed partial disallowance, and on June 30, 1994, the case was referred to the Appeals office.

On July 5, 1994, $10,801 of the tax was abated. On or about July 25, 1994, the examination division notified petitioners that $10,801 would be refunded.

On August 17, 1994, the Appeals Office referred the case back to the examination division. The case was assigned to Revenue Agent Kurt Bensworth (Mr. Bensworth). Sometime after September 28, 1994, Mr. Bensworth issued a report recommending full disallowance of the refund claim. On April 24, 1995, the IRS mailed a notice of deficiency to petitioners asserting a deficiency of $10,801--the amount of the refund claim which was previously allowed and abated.

OPINION

Petitioners contend that the real estate activity was part of the construction consulting business or, alternatively, that it was a separate trade or business. Respondent argues that the real estate activity was not part of petitioners' construction consulting business;** furthermore, respondent contends that the real estate activity was not a trade or business.

*We use the term "real estate activity" for convenience only.

**/ Respondent concedes that Mr. Finnegan was in the trade or business of being a construction consultant.

Therefore, according to respondent, section 162 does not support the deductibility of the additional expenses. Respondent alternatively argues that if the real estate activity was part of petitioners' construction consulting business, or was itself a trade or business, then the additional expenses must be capitalized.

A. Whether the Real Estate Activity Was Part of the Construction Consulting Business

Mr. Finnegan ran the construction consulting business out of his home in Santa Ana. As a construction consultant, Mr. Finnegan worked for third parties; he was compensated regardless of whether the projects he constructed were sold. There is no evidence that he was responsible for selling the projects he constructed.

Mr. Finnegan had a separate office and telephone line for the real estate activity at the Acapulco house in San Clemente. Mr. Finnegan was not hired by a third party to build the Acapulco house; his receipt of any money from his work on the Acapulco house was conditioned upon its sale; and petitioners were responsible for selling the Acapulco house.

After reviewing all the facts and circumstances, we find 'that the real estate activity was not part of petitioners' construction consulting business. Petitioners, therefore, were not entitled to deduct the additional expenses as costs of the construction consulting business.

B. Whether the Real Estate Activity Was a Separate Trade or Business

Deductions are a matter of legislative grace, and taxpayers bear the burden of proving that they are entitled to any deductions claimed. Rule 142(a); INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 84 (1992). Taxpayers are allowed a deduction for ordinary and necessary expenses paid or incurred in carrying on a trade or business. Sec. 162(a).

The Supreme Court has stated that "to be engaged in a trade or business, the taxpayer must be involved in the activity with continuity and regularity and that the taxpayer's primary purpose for engaging in the activity must be for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify". Commissioner v. Groetzinger, 480 U.S. 23, 35 (1987). Whether a taxpayer is in a trade or business requires an examination of the facts and circumstances of each case. Higgins v. Commissioner, 312 U.S. 212, 217 (1941); see also Commissioner v. Groetzinaer, supra at 36. A taxpayer may engage in more than one trade or business at the same time. Snyder v. Commissioner, 295 U.S. 134, 138-139 (1935); Gestrich v. Commissioner, 74 T.C. 525, 529 (1980), affd. without published opinion 681 P.2d 805 (3d Cir. 1982).

A taxpayer who engaged in only one venture can be found to be in a trade or business. See Morley v. Commissioner, 87 T.C. 1206, 1211 (1986); S & H. Inc. v. Commissioner, 78 T.C. 234, 244 (1982). These two cases, however, are distinguishable from the case at bar.

In S & H, Inc. v. Commissioner, supra, the taxpayer's primary business was acquiring improved real property and either leasing or operating it. In 1968, the taxpayer acquired 300 acres of unimproved land (the Whiteside Farm) which he considered to be a good investment. In 1973, Griffin Grocery Co. (Griffin) approached the taxpayer about purchasing 10 acres of the Whiteside-Farm. This transaction failed, but the taxpayer and Griffin agreed that the taxpayer would construct a warehouse on the Whiteside Farm, and Griffin would sublease the warehouse from the taxpayer for 20 years. Griffin had an option to purchase the land and warehouse after 15 years for a fee or after 20 years without payment merely by notifying the taxpayer of its election to exercise the option. The taxpayer stipulated that this sublease agreement was an installment sale of the warehouse and land to Griffin.

The Court, in holding that the taxpayer's activity constituted a

trade or business, focused on the preexisting arrangement to sell/transfer the Whiteside Farm to a specific party who was committed to take it. S & H, Inc. v. Commissioner supra at 244-245. The Court characterized this transaction as not being a "speculative venture". Id. at 245.

Mr. Finnegan's real estate activity, however, was a speculative venture, and there was no preexisting arrangement (nor any arrangement) for the transfer of the Acapulco house to any specific party, let alone someone who was committed to pay for it.

In Morley v. Commissioner, supra, the taxpayer was in the trade or business of selling real estate for commission as a broker. In September 1973, the taxpayer entered a contract giving the taxpayer the right to purchase 180 acres of property (the Elm Farm). The taxpayer did not have a particular repurchaser in mind at the time he entered the contract but intended promptly to attempt to resell the Elm Farm if he purchased it. The taxpayer purchased the Elm Farm in December 1973. From September 1973 to February 1974, the taxpayer was negotiating the sale of the Elm Farm to a third party (Mr. Pflug). In February 1974, the real estate market collapsed, and Mr. Pflug and the taxpayer terminated negotiations. Because of the real estate market collapse, the taxpayer was unable to sell the Elm Farm to other purchasers although he attempted to do so.

The Court stated that a taxpayer engaged in a single venture can be found to be in a trade or business in "situations where, at the time the property was acquired by the taxpayer, he intended promptly to resell the property and the objective facts show that he proceeded to attempt to implement that intent". Morley v. Commissioner, supra at 1211. In finding that the taxpayer was engaged in a trade or business regarding his activity involving the Elm Farm, the Court relied primarily upon the negotiations between the taxpayer and Mr. Pflug and secondarily on the fact that the taxpayer had no financial resources (because the taxpayer's net worth was tied up in nonliquid assets) which would allow him to cover the carrying charges on the Elm Farm. at 1212.

Unlike the taxpayer in Morley, Mr. Finnegan was not a real estate broker, and he never listed the Acapulco house with a broker or agent. There were no negotiations with prospective purchasers for the sale of the Acapulco house near or after its completion, and Mr. Finnegan had significant financial resources. Petitioners also still owned the Acapulco house 5 years after construction was completed. Mr. Finnegan did not meet his burden of proving that the real estate activity was a trade or business, and the objective facts do not support petitioners.

Furthermore, when evaluating whether a taxpayer's activities with respect to real estate amount to a trade or business, we consider "the nature and purpose of the acquisition of the property and the duration of the ownership; the continuity of sales or sales-related activity over a period of time; the volume and frequency of sales; the extent to which the taxpayer or his agents have engaged in sales activities by developing or improving the property, soliciting customers, and advertising; and the substantiality of sales when compared to other sources of [the] taxpayer's income, Polakis v. Commissioner, 91 T.C. 660, 670 (1988). No one of these factors, however, is determinative. Id.

The factors set forth in Polakis weigh against Mr. Finnegan. As to the nature and purpose of the construction of the Acapulco house, a lack of business intent can be inferred from petitioners, ownership of the Acapulco house for more than 5 years after Mr. Finnegan completed construction. Mr. Finnegan's sales were not continuous, frequent, or voluminous (he sold only one home during the last 20 years which he constructed). Mr. Finnegan never hired a real estate agent or broker, and his efforts to sell the Acapulco house were limited to putting a "for sale" sign in front of the house and running a classified advertisement in a local newspaper. Petitioners have not offered any credible explanation why the Acapulco house remained unsold at the time of trial (5 years after Mr. Finnegan completed its construction). Finally, petitioners had no income from the real estate activity and substantial income from other sources.

After reviewing all the facts and circumstances, we hold that the real estate activity was not a trade or business. Even though Mr. Finnegan devoted time and effort to the real estate activity, it was not regular and continuous. By so holding, we need not decide whether the real estate activity was engaged in for profit. Petitioners, therefore, were not entitled to deduct any of the additional expenses under section 162. We note that in so holding we 'need not decide whether these amounts need to be capitalized.

In reaching all of our holdings herein, we have considered all arguments by the parties and to the extent not mentioned above, we find them to be irrelevant or without merit.

To reflect the foregoing,

Decision will be entered for respondent.

APPENDIX I — EXCERPTED PAGES FROM OFFICIAL TRIAL TRANSCRIPT OF THE UNITED STATES TAX COURT, DATED JUNE 25, 1996.

UNITED STATES TAX COURT

In the Matter of:

Docket No. 6944-95

JACK R. FINNEGAN; PATRICIA J. FINNEGAN
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE
Respondent.

Tuesday,
June 25, 1996

Room 1167, llth Floor
Edward R. Roybal Center &
Federal Building
255 E. Temple Street
Los Angeles, CA 90012

The above-entitled matter came on for trial, pursuant to notice at 1:00 p.m.

BEFORE: HONORABLE JUAN F. VASQUEZ,
Judge

APPEARANCES:
On behalf of the Petitioner:
JACK R. FINNEGAN, pro se
12575 Catalina Drive
Santa Ana, CA 92705
(714) 544-3247

On behalf of the Respondent:
LOUIS JACK, Esq.
THOMAS TRAVERS, Esq.
Office of District Counsel, IRS 24000
Avila Road, Room 4404
Laguna Niguel, CA 92677
(714) 360-2681

Video/Audio Recording Services, Inc.
2001 H Street
Sacramento, CA 95814
(916) 448-2457

INDEX

OPENING STATEMENTS:	PAGE
On behalf of the Respondent	None
On behalf of the Petitioner	None

CLOSING STATEMENTS: None

WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
Jack R. Finnegan	79	96		

EXHIBITS:	IDENTIFICATION	IN EVIDENCE
Joint 1-A through 3-C		76
Joint 4-D		77

PROCEEDINGS

Page 3, Lines 1 - 18

THE CLERK: From page 12, Docket Number 6944-95, Jack R. and Patricia J. Finnegan. Would you state your appearances, please.

MR. FINNEGAN: Jack R. Finnegan, pro se, representing the petitioners.

THE COURT: Good afternoon, Mr. Finnegan.

MR. FINNEGAN: Good afternoon, Your Honor.

MR. JACK: Louis Jack for respondent. Good afternoon, Your Honor.

THE COURT: Mr. Jack, good afternoon.

MR. TRAVERS: Thomas Travers for the respondent, also, Your Honor.

THE COURT: Okay. Mr. Travers, good afternoon. Mr. Finnegan, I guess your wife is not here?

MR. FINNEGAN: No, she's not.

THE COURT: And so you're here on her behalf?

MR. FINNEGAN: Yes, I am.

Page 8, Lines 3 - 19

THE COURT: Okay. Thank you. Let me -- I think the first motion that I would like to deal with is that respondent had filed a motion to dismiss for lack of jurisdiction, and that was filed on June -- yeah, respondent filed a motion to dismiss for lack of jurisdiction on June the 5th, 1996.

And I'm sure that petitioner had filed an objection to that or a response -- but I'm not sure, exactly, what's the date of it. We have it. But in regards to the motion to dismiss for lack of jurisdiction, *the Court is going to deny respondent's motion to dismiss for lack of jurisdiction.* Emphasis added.

The Court finds that the Court does have jurisdiction, since a

notice of deficiency was issued, and since the respondent did determine that there was a deficiency. So we'll go ahead and deny respondent's motion to dismiss for lack of jurisdiction. Emphasis added.

Page 9, Lines 3 – 19

In regards to the petitioners' motion for summary judgment that was filed again June the -- I mean, May the 2nd, 1996, the *Court is going grant part of the motion for summary judgment in regards to -- that there is no deficiency in this case. Respondent has agreed that there is no deficiency, so the Court is going to grant the respondent's (sic) motion, in so far as that* -- Emphasis added.

Page 9, Lines 13 – 15

THE COURT: *Petitioners' motion, yeah, I'm sorry. Petitioners' motion for summary judgment in that there is no deficiency.* Emphasis added.

So what's in issue in the case is, basically, the overpayment. The issue in the case is whether the petitioner is entitled to an overpayment. *What is not at issue in the case is whether there's a deficiency.* Emphasis added.

Page 10, Lines 6 - 9

MR. JACK: The respondent's initial position *in our motion to dismiss was that there was no deficiency*, and that that's why the stat notice was invalid. And that was based on the idea of whether there had been a rebate or not. Emphasis added.

Page 10, Lines 15 - 19

And we do not -- *at the present time there is no dollar amount of tax due from the petitioner* – Emphasis added.

THE COURT: Okay.

MR. JACK: -- *so in that sense there is not deficiency due.* Emphasis added.

THE COURT: Okay. So it's respondent's position

Page 11, Lines 1 - 6

that there is a -- if the Court finds that there is a that we do have jurisdiction, that there is a "statutory deficiency," or there is a deficiency for statutory purposes, *but there is no tax due. Is that correct, Mr. Jack? There is no tax due?* Emphasis added

MR. JACK: *That's correct, Your Honor....* Emphasis added

Page 12, Lines 18 - 21

MR. FINNEGAN: The problem with that is –

THE COURT: -- why don't you respond, please.

MR. FINNEGAN: The problem with that is the deficiency has no foundation of correctness.

Page 13, Lines 9 – 10.

THE COURT: Okay. *But they're saying there is no tax due on that 10,000 – in fact that 10,801 is not due.* Emphasis added

Page 17, Lines 24 – 25.

THE COURT: Okay. Well, for the record, the Court finds that there is a statutory deficiency, but respondent

Page 18, Lines 1 – 15.

agreed in its memorandum -- in support of its notice of objection to the summary judgment -- petitioners' summary judgment -- *that there is no tax due.* Is that – Emphasis added.